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IN THE

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
Petitioner,

v.

DEBORAH ANNE WELLS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

Petitioner Clackamas Gastroenterology Associates, P.C., is an Oregon corporation that provides gastroenterology medical services to its client patients. JA 30. Respondent Deborah Anne Wells was employed by the Petitioner Corporation as a bookkeeper from 1986 until 1997, when her employment was terminated. JA 98.

Respondent Wells filed suit against the Petitioner Corporation in federal court, alleging, *inter alia*, that the Corporation's termination of her employment constituted a violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*

The ADA's anti-discrimination norms cover "employers," and the Act defines the covered employers as persons who have employed "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A). The Petitioner Corporation moved for summary judgment on

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Respondent Wells' ADA claim on the ground that the Corporation did not employ the threshold number of employees to be an ADA "employer." JA 85.

In the event, the Petitioner Corporation's defense turned on the disputed ADA "employee" status of four physicians – Dr. Robert Wollmuth, Dr. Jon Mason, Dr. William Ferrin, and Dr. Michael Shellfield. This was so, because the Petitioner Corporation's records established that—*not* counting the physicians—the Corporation had employed at least 14 employees in each of 28 weeks during 1996 and in each of 37 weeks during 1997. JA 55-62.[2]

If, as Respondent Wells contends and the Petitioner Corporation denies, one or more of the physicians is an ADA "employee" of the Petitioner Corporation, the Corporation is an ADA "employer." Conversely, if none of the physicians is an ADA "employee" of the Petitioner Corporation, the Corporation is not an ADA "employer."

In this regard, Respondent Wells points to the following facts: Drs. Wollmuth, Mason, Ferrin and Shellfield provide medical services to the Petitioner Corporation's client patients pursuant to employment contracts with the Petitioner Corporation. JA 66 & 71. The physicians provide these services in the Petitioner Corporation's name, from the Corporation's premises, using the Corporation's equipment. JA 71. The Petitioner Corporation has established standards that govern the physicians' provision of medical services, and, in

[2] The Petitioner Corporation's records show that, putting aside the four physicians, there were 10 weeks in 1996 when the Corporation employed 15 employees and 9 weeks 1997 when the Corporation employed 15 employees. JA 55-62. In addition—and again, not counting the four physicians—there were 18 weeks in 1996 when the Petitioner Corporation employed 14 employees, and 28 weeks in 1997 when the Corporation employed 14 employees. JA 55-62.

this regard, the physicians are supervised by the Corporation's administrator to whom, in the administrator's words, the physicians "officially report . . . as employees." JA 66.

The Petitioner Corporation, in turn, points to the fact that Drs. Wollmuth, Mason, Ferrin and Shellfield are also the Corporation's sole shareholders and its sole directors. JA 29-30.

The district court held that the physicians' roles as shareholders and directors of the Petitioner Corporation precluded them from being "employees" of the Corporation within the meaning of the ADA. JA 89. The court of appeals reversed this ruling and held that the physicians are "employees" within the meaning of the ADA. JA 102.

SUMMARY OF ARGUMENT

I. The Americans with Disabilities Act—in common with numerous federal labor statutes—defines the "term 'employee'" to "mean[] an individual employed by an employer." 29 U.S.C. § 12111(4). Under this Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 325 (1992), where a statute so defines the term "employee," the "presumption [is] that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." And, nothing in the ADA does "indicate[] otherwise."

Under the common law of agency definition, an individual who is an integral part of an enterprise by virtue of the performance of services on a regular basis that further the enterprise's affairs is a paradigm "employee" of the enterprise. That is true whether the service provider does manual work, skilled technical work or managerial work for the enterprise.

Under the common law definition, the four physicians whose "employee" status is in question here are undoubtedly employees of the Petitioner Corporation. The essence of the

matter is that the physicians perform medical services for the Petitioner Corporation's client patients in the Corporation's name, pursuant to employment contracts with the Corporation.

The fact that the physicians are also the Corporation's sole shareholders and sole directors does not negate their status as common law employees and transform them into nonemployees. The law of corporations presumes that a corporation and its shareholders are separate and distinct, and this is so regardless of whether the corporation has many or few shareholders. Thus, a shareholder may be an employee of the corporation, even if he or she is the sole shareholder.

The common law definition of employee more fully furthers the ADA's statutory purposes of providing comprehensive protection against disability discrimination and clear, consistent anti-discrimination standards than the various alternatives proposed by the United States and the Petitioner Corporation. This is so, in large part, because whether an entity is covered by the ADA norms at all as an "employer" depends upon the number of "employees" the entity employs. Excluding certain common law employees from the category of ADA "employees" would thus artificially reduce both the number of employers covered by the Act, and the number of employees protected by the Act.

II. The United States proposes that the EEOC Compliance Manual "modified common law definition" of employee be substituted for the common law definition. The EEOC Manual's definition treats as nonemployees those individuals who are common law employees and who are also "partners, officers, members of boards of directors, and major shareholders" that "participate[] in managing" the enterprise.

The Government does not even pretend that there is anything in the ADA's statutory language, structure or history that indicates that Congress intended the statutory term "employee" to have a meaning different from the common

law definition of that term. Under *Darden*, this lack of a statutory base for the Government's proposed definition requires its rejection.

To be sure, the Government offers the justification that its proposal is sufficient to provide protection for the "most vulnerable" employees, albeit not for less vulnerable employees. That justification—if it can be taken as one at all—does nothing to square the Government's position with *Darden*. And, the Government does not explain how it furthers the ADA's purpose to restrict the Act's protections to that extent. Indeed, the Government ignores altogether the fact that, as in this case, its restrictive definition of "employee" can cause an entity to fall below the statutory threshold for coverage with the result that many entirely vulnerable employees will be deprived of protection.

III. The Petitioner Corporation seeks to rely on a line of anti-discrimination statute cases—derived from the Seventh Circuit's leading decision in *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977)—holding that partners are nonemployees *per se*. The Corporation argues that the physician-shareholders here should be treated as the equivalent of partners and the Corporation as the equivalent of a partnership. The *Burke* line of partnership cases are, however, inapplicable to the corporations context. Those cases rest on the view that, under the law of partnerships, a partnership is, for all purposes, identical with its partners and that the partners are the employer and by definition cannot at the same time be employees. But under the law of corporations, the corporation is for all purposes separate from its shareholders and the corporation, not the shareholders, is the employer of the corporation's employees.

Beyond that fundamental logical fallacy, the Petitioner Corporation's argument by analogy from the *Burke v. Friedman* line of cases suffers from the problem that *Burke* itself is unsound, even in the context of partnerships. Contrary to

Burke, the common law of agency is clear that partners can be the common law employees of their partnership.

ARGUMENT

I. Under the common law of agency, Drs. Wollmuth, Mason, Ferrin and Shellfield are employees of Petitioner Clackamas Gastroenterology Associates, P.C., and the Petitioner Corporation is their employer. Under *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), it follows that the four physicians are employees of the Petitioner Corporation for purposes of the Americans with Disabilities Act.

A. The ADA—in common with numerous federal labor statutes—defines the "term 'employee'" to "mean[] an individual employed by an employer." 42 U.S.C. § 12111(4). *See, e.g.*, 29 U.S.C. § 203(e)(1) (Fair Labor Standards Act); 29 U.S.C. § 652(6) (Occupational Safety and Health Act); 29 U.S.C. § 630(f) (Age Discrimination in Employment Act); 29 U.S.C. § 1002 (6) (Employment Retirement Income Security Act); 42 U.S.C. § 2000e(f) (Title VII of the Civil Rights Act of 1964). In order to give content to this common statutory definition—which otherwise is "completely circular and explains nothing"—this Court has adopted the "presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." *Darden*, 503 U.S. at 323 & 325. And, nothing in the ADA's legislative language, structure or background does "indicate[] otherwise."

In the common law of agency, the employer-employee relationship is known as the "master-servant" relationship. *See Restatement (Second) of Agency* § 2, comment d, p. 14 (1958) ("*Restatement*").[3] "A master," by the common law's definition, "is a principal who employs an agent to perform service in his affairs and who controls or has the right to

[3] Except where otherwise noted, all citations are to volume 1 of the *Restatement*.

control the physical conduct of the other in the performance of the service." *Id.* § 2(1), p. 12. "A servant," conversely, "is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* § 2(2), p. 12. And, in contradistinction to a "servant," an "independent contractor" is one "who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." *Id.* § 2(3), p. 12.

The "common-law test for determining who qualifies as an 'employee,' . . . contains 'no shorthand formula or magic phrase that can be applied to find the answer.'" *Darden*, 503 U.S. at 323-324, quoting *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). But, for the set of core situations involving an enterprise and the individuals who, on a regular and continuing basis, "perform service in [the enterprise's] affairs," *Restatement* § 2(1), p. 12, the salient point is this:

> "[P]ersons who are doing things for others are servants if there is [a] very close economic relation and control [between the principal and that person]; and . . . this is true whether or not the persons are primarily engaged to do manual work or to make contracts. Indeed, fully employed but highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise." *Restatement* ch. 7, topic 2, title B, introductory note, p. 479.

The *Restatement* elaborates on the nature of the requisite "close economic relation and control" in the following terms:

> "*[T]he servant is one within the business household of the principal*, whereas the non-servant is on the outside.

> *The servant is, thus an integral part of his master's establishment*; the non-servant aids in the business enterprise but is not a part of it. * * * Primarily, the servant sells his personal services, submitting to control as to his physical activities and the use of his time. The non-servant agent agrees sometimes to render services and sometimes to achieve results, but he does not surrender control over his physical actions. [*F*]*ull time employees of a business are typical of the servant group*, factors, brokers and attorneys at law represent the non-servant type of agents." *Id.* (emphasis added).

The common law definition of the master/servant relationship—and its operative phrase "control or right to control"—thus rests on an assessment of "the closeness of the relation between the one giving and the one receiving the service," *Restatement* § 220, comment a, p. 486, and in particular on whether the service provider functions as an "integral part of . . . the business enterprise," *id.* ch. 7, topic 2, title B, introductory note, p. 479. *See id.* § 219 comment a, p. 82 ("intimacy of relation . . . distinguishes the servant from the non-servant").[4]

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[4] As the *Restatement* adds, there are "marginal situations" in which the person providing services stands in an intermediate relationship to the enterprise:

> "The great mass of persons who act for others but who are not an integral part of the business establishment and who are used as the need arises,—the factor, the broker, the non-resident selling agent, the lawyer—all of such persons who are not under the immediate eye of the head of the business and who normally operate independent enterprises, obviously do not fall within the group of business intimates. Some might, a priori, be put into either the group of servants or the group of independent contractors. Thus, for instance, a person who derives his entire income from the principal and yet who has no duty to act except as he himself desires and who responds to no discipline, such as some traveling salesman working on commission, or truck owners paid by the ton mile, might be put into either category. So, too, there are casual manual workers, the carpenter and plumber, who come only when needed and remain but for a short period. The modern enterprise utilizes all of these and it is in these marginal situations that during the past century and a half it has become essential to develop tests for distinguishing the servant from the non-servant." § 219, comment a, p. 482.

The tests for distinguishing the servant from the non-servant in these marginal situations require, as this Court has noted, that "'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Darden*, 503 U.S. at 324, quoting *United Insurance*, 390 U.S. at 258. In this regard, the *Restatement* provides a list of ten factors that are to be considered—"among others"—in distinguishing between the two. *Restatement* § 220(2), pp. 485-486. *See also* Rev. Ruling 87-41, 1987-1 Cum. Bull. 296, 298-299 (listing 20 factors).

This focus on the closeness of the service-provider/service-receiver relation furthers the dual purposes served by the common law definition of the master/servant relationship. *Restatement* ch. 7, topic 2, title B, introductory note, p. 479. The first of these purposes is to delineate the group of persons for whose tortious acts in "the performance of the principal's business" the principal is to be held responsible. *Id.* § 219, comment a, p. 483. The second, and equally important, purpose is to delineate "the group of persons to whom at common law the employer had special duties" with respect to the terms and conditions of their work. *Id.* ch. 7, topic 2, title B, introductory note, p. 479-480.

B. By any measure, Drs. Wollmuth, Mason, Ferrin and Shellfield in performing services on the Petitioner Corporation's behalf stand in a sufficiently close relation to the Corporation to be the Corporation's employees under the common law test.

The Petitioner Corporation provides gastroenterology medical services to its client patients, and the individuals who perform these services on the Corporation's behalf are Drs. Wollmuth, Mason, Ferrin and Shellfield. It is indisputable, then, that the physicians' "work is part of the regular business

of the employer" and is "an incident of the business establishment of the employer." *Restatement* § 220, comments h & i, p. 489. And, the physicians perform these services in the Petitioner Corporation's name, on the Corporation's premises and using the Corporation's equipment. *Id.* § 220, comment l, p. 491. What is more the physicians perform these services pursuant to contracts of employment with the Petitioner Corporation, in conformity with standards established by the Corporation and under the supervision of the Corporation's administrator. *See id.* § 220, comment d, p. 487.

Thus, it is unquestionably the case that if one of the physicians were injured on the Petitioner Corporation's premises as the result of some unsafe working condition, the Corporation would be liable for that harm. *Restatement* § 492 & comment c, vol. 2, pp. 436-437(non-delegable duty to provide reasonably safe working conditions). *See id.* § 528, vol., 2, p. 505 (liability for failure to perform non-delegable duty may be diminished or terminated by statute providing no-fault workers compensation). Likewise, if one of the physicians were to commit a tort in the course of performing medical services on the Petitioner Corporation's behalf, the Corporation would be liable for that wrong. *Id.* § 219(1), vol. 1, p. 481.[5]

In short, the relationship between the Petitioner Corporation and Drs. Wollmuth, Mason, Ferrin and Shellfield is

[5] If the tort involved the rendering of medical services, the Corporation's shareholders would have limited personal liability up to a maximum of $300,000 for each shareholder. Or. Rev. Stat. § 58.185(5). Notwithstanding this limited personal liability, the Corporation would remain liable for the full amount of damage caused by its physician employees with respect to tortious conduct in the course of providing medical services. *Id.* § 58.185(10). With respect to torts not involving medical services, the Corporation's shareholders would have no personal liability. *Id.* § 58.185(11).

such as to make the Corporation responsible to and for the physicians to the same extent that a master is responsible to and for a servant at common law.

C. Against all this it is urged that Drs. Wollmuth, Mason, Ferrin and Shellfield are nonemployees, because, in addition to being the Corporation's common law employees, the physicians are also the sole shareholders and sole directors of the Corporation. The theory is that the physicians' proprietary interest in, and ultimate control over, the Petitioner Corporation is such that the physicians must be treated as identical with the Corporation and thus as the masters of that enterprise who cannot at the same time be its servants.

That theory fails because the common law recognizes an essential difference between a corporate enterprise and its shareholders for purposes of defining the master/servant relationship.

"A corporation and its shareholders are presumed separate and distinct, whether the corporation has many shareholders or only one." 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 14, p. 432 (rev. ed. 1999). *See Restatement* § 14 M, comment a, p. 79 ("A corporation is not the agent of one person, or of a number of persons, who can direct its conduct because holding a majority of its voting shares of stock."). Thus, "a shareholder may also be an employee of the corporation." 1 Fletcher, *Cyclopedia of the Law of Private Corporations* § 30, p. 509. *See Burnet v. Clark*, 287 U.S. 410, 415 (1932). As this Court recently held, it is improper, given these principles, to collapse the identity of a corporation and an employee-shareholder, "even where the employee is the corporation's sole owner." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

The *Cedric Kushner* Court addressed whether "a person who is the president and sole shareholder of a closely held corporation" could be "'a[] person employed by . . . [that] enterprise'" within the meaning of the Racketeer Influenced

and Corrupt Organizations Act. 533 U.S. at 160, quoting 18 U.S.C. § 1961. The Court rejected the argument that there was not a sufficient separation between the corporation and the president-owner for the latter to be treated as a distinct person employed by the corporation. In this regard, the Court explained, in the eye of the law, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." 533 U.S. at 163.

Applying the common law definition of employee against the background of the law of corporations, it could thus not be more clear that the physicians' ownership interest in the Petitioner Corporation does not preclude treating the physicians—as individuals who are performing services on the Petitioner Corporation's behalf as an integral part of the Corporation's business—as employees of the Corporation.[6]

D. By treating employee-shareholders as ADA "employees," the common law definition of employee advances the ADA's statutory goal of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" through "clear, strong, consistent, enforceable [anti-discrimination] stand ards." 42 U.S.C. § 12101(b)(1) & (2).

This is so, in large part, because the number of individuals who are treated as ADA "employees" can determine whether the entity employing those employees is covered by the Act at

[6] To foreshadow a point taken up in the final section of this brief, we note that the common law distinction between ownership of an enterprise, on the one hand, and employment by the enterprise, on the other, is not a unique feature of the law of corporations. Thus, even though "[a] partnership is an association of two or more persons to carry on as co-owners a business," the *Restatement* flatly states that "[w]hen one of the partners is . . . regularly employed in the business, he is a servant of the partnership." *Restatement* § 14 A & comment a, p. 62.

all. Like Title VII of the Civil Rights Act and the Age Discrimination in Employment Act, the ADA covers only entities that have "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," 42 U.S.C. § 12111(5)(A), and does not cover entities with a lesser number of employees. Coverage is limited in this fashion "in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims." *Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994). And, the measure by which Congress chose to determine the magnitude of the covered entities is the number of individuals employed by the entity.

Whether some of the individuals who carry out an entity's affairs also own a substantial share of the entity's stock makes no difference whatsoever to the magnitude of the entity's operations measured in this way. To take the instant case, the Petitioner Corporation's operations would be of the same magnitude if, instead of the Corporation's stock being held by the four physicians performing medical services on the Corporation's behalf, the stock was held by three of the physicians and the other physician was not a shareholder. And, as we have noted, treating even one of the four physicians here as an employee of the Petitioner Corporation would be sufficient to bring the Corporation within the ADA's coverage. *See* p. 2, n. 2, *supra*. It makes no sense to classify the Petitioner Corporation as a small entity that not is an ADA employer while treating the hypothetical three-shareholder corporation as a sufficiently large entity to be an ADA employer, when in terms of the ADA coverage measure—the number of individuals who are furthering the corporation's affairs as service providers on its behalf—the two are identical.

In addition to depriving *all* employees of certain entities—including employees who are not shareholders—of the

ADA's protections, a definition of "employee" that excludes employee-shareholders would deprive the excluded employee-shareholders of that protection against unlawful employment discrimination as well. For instance, if one of the four physicians at issue in this case were to become disabled and the Petitioner Corporation were to deny him the sort of reasonable accommodation in performing his work mandated by the ADA, the disabled physician would be subject to precisely the type of employment discrimination the Act is intended to preclude and his status as one shareholder (out of four) would not ameliorate the effects of that discrimination in the least.

II. The United States, joined by the Equal Employment Opportunity Commission (EEOC), argues that the common law definition of employee is *not* the appropriate definition for determining whether Drs. Wollmuth, Mason, Ferrin and Shellfield are "employees" of the Petitioner Corporation within the meaning of the ADA. *See* U.S. Br. 20. The alternative to the common law definition proposed by the Government is the set of definitional rules stated in the EEOC's Compliance Manual for determining whether common law employees who are also "partners, officers, members of boards of directors, and major shareholders" are "employees" within the meaning of the federal anti-discrimination laws. EEOC Compliance Manual § 1 d.

It is dispositive that *Darden* requires rejection of the alternate employee definition proffered by the Government. And, it is also the case that the proffered alternative is so defective in its logic as to require rejection in any event.

A. The EEOC Compliance Manual describes a two-step process for determining whether individuals who are service providers to an enterprise and are also "partners, officers, members of boards of directors, and major shareholders" in the enterprise are statutory "employees." EEOC Compliance Manual § 1.

The threshold step under the EEOC Manual's test is to determine whether the individual in question is an "employee" under the common law definition set out in *Darden*. EEOC Compliance Manual § 1 & n. 71.

Once that threshold has been met, the EEOC Manual's test defines a set of "additional considerations" that must be taken into account "in determining whether an employer-employee relationship exists" with respect to common law employees who are "partners, officers, members of boards of directors, [or] major shareholders" of the employer. EEOC Compliance Manual § 1 d.

In this regard, the EEOC Manual requires consideration of "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." EEOC Compliance Manual § 1d. By reason of this consideration, "[i]n *most* circumstances, individuals who are partners, officers, members, of boards of directors, or major shareholders will *not* qualify as employees," even though those individuals are employees under the common law definition. *Id.* (emphasis added).

The EEOC Manual's definition of "employee" is more restrictive than the common law definition in part because the Manual focuses on "[w]hether the individual reports to someone higher in the organization." EEOC Compliance Manual § 1 d. The common law, by contrast, provides that "highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are *not controlled in their day-to-day work by other human beings*." *Restatement* ch. 7, topic 2, title B, introductory note, p. 479 (emphasis added). Under the common law definition, "managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them." *Id.* § 220,

comment a, p. 486. *See also id.* § 2, comment c, p. 14 ("the officers of a corporation . . . are servants equally with the janitor and others performing manual labor").

Beyond that, the EEOC Manual definition adds an element that is entirely foreign to the common law definition—whether the individual in question "participates in managing the organization." EEOC Compliance Manual § 1 d. And, the Manual gives the following example of a person whose participation in management is sufficient to exclude her from statutory protection: "the head of one of the corporation's divisions" who "has the right to vote on decisions taken by [the corporation], although her vote does not count as much as those of other individuals." *Id.* Thus, as the Brief for the United States very aptly puts it, "[t]he heart of the matter" under the EEOC Manual definition "is whether an individual exercises a *degree* of control inconsistent with employee status." U.S. Br. 23 (emphasis added).[7]

B. This is not the first time that the United States has urged a "modified common-law definition of 'employee'" for the purpose of defining the term "employee" in a federal labor statute. *Darden*, 503 U.S. at 325-326. The Government did so in *Darden* for purposes of defining the term "employee" in ERISA. Rejecting the Government's position

[7] Just how limited a "degree of control" can make a common law employee into an anti-discrimination law nonemployee is demonstrated by this case. The Petitioner Corporation is owned by four physician-shareholders. If any one of the physicians is an ADA "employee," the Petitioner Corporation meets the threshold to be an ADA "employer." If ownership and control is equally divided among the four physician-shareholders, any one of them is vulnerable to employment discrimination generated or approved by the other three. And, if ownership and control is not equally divided, at least one of the physicians is even more vulnerable to employment discrimination. Nevertheless, the United States takes the position that, applying the EEOC definition, the record evidence on its face "suggest[s] that petitioner's shareholder-directors may not be employees." U.S. Br. 24.

in that case, the *Darden* Court "adopt[ed] a common-law test for determining who qualifies as an 'employee' under ERISA." *Id.* at 323. In so doing, the Court announced a "presumption" applicable to *all* federal labor statutes "that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." *Id.* at 325.

The Government does not even pretend that in enacting the ADA Congress "clearly indicate[d] otherwise." Indeed, the United States makes no attempt to identify anything in the language, structure or legislative history of the ADA that would so much as suggest a Congressional intent to provide for an ADA definition of "employee" that departs from the presumptively applicable common law definition.[8]

Instead, the Government seeks to justify such a departure on the theory that the common law definition is not the appropriate ADA definition, because "the common law standard is designed to distinguish between servants and independent contractors for the purpose of determining when an employer is subject to vicarious liability" whereas the purpose of distinguishing between employees and nonemployees here is "to determine who receives protection against discrimination based on a disability." U.S. Br. 20.

The Government's explanation is not an attempt to bring its proffered definition of "employee" within *Darden* but rather a frontal attack on *Darden* that is too feeble to succeed. *Darden*'s point is that unless *Congress* indicates otherwise it is not for the Government or the courts to substitute their own

[8] It is worthy of note that when Congress wishes to cover common law employees generally and at the same time to exclude higher level common law employees from the protected class, it knows how to do so. *See, e.g.*, 29 U.S.C. § 152(2) ("The term 'employee' . . . shall not include any individual . . . employed as a supervisor."). *See also* 29 U.S.C. § 152(11) (defining "supervisor").

statute-by-statute definitions of "employee"—derived from their perception of the statute's general purposes or otherwise—for the common law definition.

While that is dispositive, we would note that the Government's justification is, in any event, based on a plain misunderstanding of the office of the common law definition. One of the two offices performed by the common law definition is precisely to "indicate the relation from which arises . . . the special duties and immunities of an employer to the employee." *Restatement* § 2, comment a, p. 13. *See id.* ch. 7, topic 2, title B, introductory note, pp. 479-480 ("The second purpose in defining the category of servant is to indicate the group of persons to whom at common law the employer had special duties and freedom from liability."). And, among the special duties owed by a master to his servants, as defined by the common law, are those "duties imposed upon him by statute for their protection." *Id.* § 520, p. 487.

The sole justification the Government offers for the particular substitute it proffers here—the EEOC Compliance Manual definition of employee—is, we would add, equally deficient. That justification is that

> "by classifying as non-employees those shareholders, partners, officers, and directors who actually own and manage the business, the EEOC's guidance excludes from protection those who are most able to control the firm's practices and who, as a consequence, are least vulnerable to the discriminatory treatment prohibited by the Act." U.S. Br. 11.

Quite understandably, the Government does not enlighten us as to how it serves the ADA's purpose to "exclude[] from protection those who are"—in any degree—"vulnerable to the discriminatory treatment prohibited by the Act." U.S. Br. 11. "Least vulnerable" or not, the EEOC Manual definition would exclude from the ADA's protection common law

employees who—despite the fact that they "exercise[] a degree of control" over the employing entity, *id.* at 23—are nevertheless subject to employment discrimination of exactly the sort prohibited by the statute.

What is more, as this case so vividly demonstrates, the EEOC Manual's definition strips protection not only from these "least vulnerable" employees but also from many entirely vulnerable employees: Deborah Wells—the plaintiff in this case—was not one of the physician-shareholders, she was a bookkeeper. And, the Manual's definition, if applied here would deprive her—and every other one of the Petitioner Corporation's employees—of the protections of the federal anti-discrimination laws.

It is also to the point that the EEOC Manual's "participates-in-managing" test is, contrary to the Government's assertion, far from "workable." U.S. Br. 17-19. In the first place, the Manual's test admittedly results in a number of individuals who are unquestionably employees for many other purposes, such as pension benefits and workers compensation, being treated as non-employees for purposes of the anti-discrimination laws. Moreover, by requiring a determination of "whether an individual exercises *a degree of control*" that is deemed "inconsistent with employee status," the Manual's standard requires difficult line drawing among higher level common law employees to determine the persons who have sufficient control to provide themselves sufficient protection against employment discrimination to justify their classification as non-employees under the anti-discrimination laws. U.S. Br. 23 (emphasis added). And, the EEOC Manual provides no calculus for determining at what "degree" the line is to be drawn. In both regards, the Manual's "participates in managing" test can only foster the confusion that is the enemy of a workable legal regime.

III. The Petitioner Corporation provides no definition of the statutory term "employee." Instead, the Petitioner Corpo-

ration advances a syllogistic argument for classifying the four physicians whose status is at issue here as non-employees.

The major premise of the Petitioner Corporation's argument is that "those who are properly classified as partners are not 'employees' for purposes of the anti-discrimination statues." Pet. Br. 16. The minor premise is that the physician-shareholders in a closely held professional corporation "are, in reality, partners." *Id.* at 9. And, says the Petitioner Corporation, the conclusion that follows is that the physician-shareholders—like partners—are "not 'employees' under the ADA." *Id.*

There are two fundamental flaws in this argument. The first flaw, which we address immediately below, is that the syllogism's minor premise—that there is a relevant identity between the physician-shareholders and partners—is wrong. The second flaw, which we take up in the final section of this brief, is that the syllogism's major premise—that by definition partners cannot be "employees" of their partnership—is wrong as well.

A. The first difficulty with the Petitioner Corporation's syllogistic argument is that the case law supporting its major premise rests on a purely formal analysis of partnerships and of partnership law that cannot be extended to the corporations context by positing an identity between the physician-shareholders here and partners.

The leading decision for the proposition that an individual who is a partner is a nonemployee *per se* for purpose of the federal anti-discrimination laws—regardless of whether that individual furthers the partnership's affairs by providing services on the partnership's behalf—is *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977). *See Hishon v. King & Spalding*, 678 F.2d 1022, 1027-28 (11th Cir. 1982) (citing and following *Burke*), *rev'd*, 467 U.S. 69 (1984); *Wheeler v. Hurdman*, 825 F.2d 257, 262-263 (10th Cir. 1987) (same).

See also Hishon v. King & Spalding, 467 U.S. 69, 79-80 (1984) (Powell, J., concurring).[9]

Burke reaches that conclusion as follows: Title VII "defines an employer in part as a 'person.'" 556 F.2d at 869, quoting 42 U.S.C. § 2000e(b). "The term 'person' is defined in § 2000e(a) as including 'partnerships.'" 556 F.2d at 869. "Therefore, § 2000e is written so as to include partnership as one of the possible 'persons' acting as an employer." *Id.* A "partnership," however, is nothing more than "'an association of two or more persons to carry on as co-owners a business for profit.'" *Id.*, quoting § 6 of the Uniform Partnership Act (1914). And, "[i]n light of the foregoing," said the *Burke* court, it is impossible to "see how partners can be regarded as employees rather than as employers." 556 F.2d at 869.

Burke thus essays a purely formal analysis of partnerships and partnership law. Since the structure of partnerships and the law of partnerships are distinctly different from the structure of corporations and the law of cirporations, the *Burke* analysis is, by its terms, inapplicable in the corporate context.

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[9] Justice Powell's concurring opinion in *Hishon* expressed the view—on a point not addressed in the Court's opinion—that the "relationship among law partners" is not appropriately governed by Title VII on the ground that the "essence of the law partnership is the common conduct of a shared enterprise" that "contemplates that decisions important to the partnership normally will be made by common agreement." 467 U.S. at 79-80. *But see* p. 23 n. 10, *infra*. At the same time, Justice Powell was careful to state that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" 467 U.S. at 79 n. 2. The distinction that Justice Powell drew between true partners and titular partners—which is not of the moment here—has spawned considerable debate in the courts of appeals over who is, and who is not, a true partner. *See EEOC v. Sidley Austin Brown & Wood*, ___ F.3d ___, 2002 WL 31387525, pp. *4-*9 & *11-*14 (7th Cir., Oct. 24, 2002).

While *Burke* rests on the proposition that there is a legal identity between a partnership and its partners, the well-settled law of corporations is that "a duly organized corporation enjoys a legal identity separate and apart from its shareholders, directors and officers." 1 Fletcher, *Cyclopedia of the Law of Private Corporations* § 25, p. 476. "The importance of observing these distinctions . . . pervades the whole law of corporations, being fundamental in many of the rules of law." *Id.* at p. 485. That being so, it is well-settled that "a shareholder may also be an employee of the corporation." *Id.* at § 30, p. 509. This "fundamental" aspect of corporate law makes the *Burke* analysis—which rests on an assumed legal identity of a partnership and the partners—inapplicable.

The Petitioner Corporation's point that the physician-shareholders are "in reality partners" fails, because in the only way relevant—whether the physician-shareholders and the Petitioner Corporation are, like the *Burke* partners and partnership, a single legal entity – the physician-shareholders are *not* at all the same as partners. Thus, the Petitioner Corporation's attempt to expand *Burke*'s partner/nonemployee rule into a shareholder/nonemployee rule must be rejected.

B. While the foregoing is sufficient, we would be remise if we did not add that *Burke* and like cases get their common law of agency wrong and are thus unsound under *Darden*. As we have noted, the *Restatement of Agency* recognizes *both* that "[a] partnership is an association of two or more persons to carry on as co-owners a business," *and* that "[w]hen one of the partners is . . . regularly employed in the business, he is a servant of the partnership." *Restatement* § 14 A & comment a, p. 62.

Indeed, the *Restatement* does so even though it states the law of agency at a time when the law of partnerships was grounded in the "aggregate theory" that a partnership is nothing more than an "aggregation of individuals." Uniform

Law Commissioners, *Summary: Uniform Partnership Act (1994)*, http://www.nccusl.org/nccusl/uniformact_summaries, p. 2 (11/19/02). *See* D. Weidner & J. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 Bus. Law. 1 (1993). The "aggregate theory" itself has since been repudiated in favor of the "entity theory," and reflecting that change the Revised Uniform Partnership Act provides that "[a] partnership is an entity distinct from its partners." RUPA § 201(a) (1997). This change reinforces the *Restatement*'s understanding of the relation between a partnership and its partner-employees and by so doing further undermines *Burke*.[10]

Burke is thus wrong even in the partnership context. Certainly there is no reason to compound *Burke*'s error by extending its reach to the dissimilar corporations context.

There is, in sum, nothing to the analogy of the physician-shareholders to partners which forms the sole support for the Petitioner Corporation's claim that the physicians are not "employees" within the meaning of the ADA.

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[10] The premise that partnerships are by their nature collegial decision-making bodies—which served as the basis for Justice Powell's doubts about the applicability of Title VII to relations among partners, *Hishon*, 467 U.S. at 79-80—is undermined by the Revised Uniform Partnership Act, which provides that "right to participate in the management of the partnership" can be waived by a "contrary agreement." RUPA § 401, comment 7. *See* RUPA § 103(a) ("[R]elations among the partners and between the partners and the partnership are governed by the partnership agreement.").

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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